IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA. 10-0102

GASTON ENGINEERING & SURVEYING, P.C.,	)
Appellant,	)
vs.	)
OAKWOOD PROPERTIES, LLC and YELLOWSTONE BANK,	)
Appellees.	)

APPELLEE'S ANSWER BRIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Citation: **PAGE**

STATE

STATUTES AND RULES

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether the District Court correctly ruled as a matter of law that Yellowstone Bank's mortgage has priority over Gaston Engineering & Surveying, PC's construction lien?

2. Whether the District Court correctly denied Gaston's Rule 59(g) Motion for Amendment of Judgment?

II. STATEMENT OF THE CASE

On December 17, 2007, Gaston sued Oakwood Properties, LLC ("Oakwood") and Yellowstone Bank ("Yellowstone") to foreclose Gaston's construction lien. On April 16, 2008, Yellowstone filed its Amended Answer denying, among other matters, Gaston's priority claim over Yellowstone's mortgage. (Dkt. 16).

On June 17, 2008, Gaston filed a Motion for Summary Judgment against both Defendants. (Dkt. 24 & 25). On August 12, 2008, Gaston disclosed Ron Farmer as an expert. (Dkt. 31). On August 18, 2008, Yellowstone opposed Gaston's Motion for Summary Judgment and filed two affidavits with its brief. (Dkt. 33, 34 & 35).

On September 25, 2008, the District Court held a hearing on Gaston's summary judgment motion. Yellowstone filed two affidavits the day before the hearing. (Dkt. 42 & 43). Yellowstone argued that, based on the

undisputed facts, Yellowstone was entitled to judgment in its favor. (Tr. 14:20-24; 37:20-38:21).

During the hearing, Gaston represented that Oakwood and Gaston had agreed to a stipulated judgment against Oakwood. At the conclusion of the hearing, the District Court invited Yellowstone to file a brief addressing whether the stipulated judgment had any bearing on Gaston's motion for summary judgment. On October 15, 2008, Yellowstone filed its brief and argued that the stipulated judgment did not contravene Yellowstone's priority position. (Dkt. 47). On October 20, 2008, Gaston responded and argued that it was entitled to summary judgment. (Dkt. 49).

On March 16, 2009, Gaston filed a Notice of Supplemental Authority In Re: Gaston's Motion for Summary Judgment. (Dkt. 60). This was the first of many filings in which Gaston argued it was entitled to summary judgment. In the Notice, Gaston discussed cases from other jurisdictions that were available to Gaston before the summary judgment hearing. As a result, Yellowstone filed a Motion to Strike Gaston's Notice. (Dkt. 61). The District Court granted Yellowstone's Motion to Strike. (Dkt. 131). Gaston has not appealed this ruling.

On May 22, 2009, Gaston filed a Motion for Sanctions for Discovery Abuses. (Dkt. 71). On or about June 1, 2009, Gaston filed a Notice of

Filing Motion to Intervene and Consolidate the instant lawsuit with another lawsuit pending between Yellowstone, First Interstate Bank and Oakwood (the "Other Action"). (Dkt. 78). On June 9, 2009, the day of the Pretrial Conference, Gaston filed its Ex Parte Request to withdraw its motion to intervene. (Dkt. 77).

On June 18, 2009, Yellowstone responded to Gaston's Motion for Sanctions. (Dkt. 81). Yellowstone argued that Gaston already had some of the documents it claimed were not produced and, more importantly, Gaston had not uncovered any information it did not know before the summary judgment hearing. (Dkt. 81). The parties resolved the Motion for Sanctions and, as part of the resolution, Gaston withdrew its Motion and was granted leave to file another summary judgment brief. (Dkt. 94 & 95).

On August 11, 2009, Gaston filed its Supplemental Brief in Support of Motion for Summary Judgment (hereinafter "Second Motion"). This was Gaston's sixth brief in support of its Motion. (Dkt. 98, p. 2). Gaston's Second Motion presented new arguments. (Id., p. 2-3).

On August 24, 2009, Yellowstone filed its Reply to Gaston's Supplement Brief and Request for Entry of Summary Judgment in Yellowstone Bank's Favor. (Dkt. 98). In its Reply, Yellowstone requested that the District Court enter summary judgment in its favor because, as a

matter of law, Yellowstone's mortgage had priority over Gaston's lien. Yellowstone also requested oral argument. (Dkt. 99).

On September 9, 2009, Gaston filed its Supplemental Reply in Support of Summary Judgment. (Dkt. 100). Gaston did not submit any affidavits. Gaston also objected to Yellowstone's request for a hearing. (Dkt. 102).

On November 11, 2009, Gaston filed its Notice of Recent Supreme Court Opinion on All Fours with Gaston's Motion for Summary Judgment. (Dkt. 112). On November 16, 2009, Yellowstone filed its Opposition to Gaston's Notice of Recent Supreme Court Opinion. (Dkt. 120). On November 18, 2009, Gaston filed its response brief. (Dkt. 121).

On November 25, 2009, the District Court issued its Order Re: Summary Judgment in which it ruled that Yellowstone's mortgage had priority over Gaston's lien. (Dkt. 131). The District Court ordered the parties to notify the Court whether the trial set for December 1st should be vacated. (Id., p. 10). On November 25, 2009, Yellowstone conferred with Gaston about vacating the trial so that the parties could release the witnesses from the subpoenas before Thanksgiving, which was the following day. (Dkt. 136, p. 2). Gaston refused to do so. (Id.; Dkt. 76, pp. 13-14). Thus, Yellowstone filed a Motion to Vacate Trial. (Dkt. 136).

On November 25, 2009, Gaston filed a Motion for Amendment of Judgment. (Dkt. 137). On Friday, November 27, 2009, Gaston filed its Brief in Support of Rule 59(g) Motion and requested an expedited ruling so that the parties could try the case on December 1st. (Dkt. 138). On November 30, 2009, Gaston re-filed its Brief in Support of Rule 59(g) Motion because it had not filed attachments with its original brief. (Dkt. 144 & 146). Gaston did not provide Yellowstone with the exhibits or attachments to the brief. (Dkt. 140). On November 30, 2009, the District Court vacated the trial and denied Gaston's Rule 59(g) motion without prejudice. (Dkt. 149). On December 3, 2009, Judgment was entered. (Dkt. 152 & 153).

On December 11, 2009, Gaston re-filed its Motion for Amendment of Judgment along with the affidavits of Ron Farmer, Kelly Taylor and Kellie Sironi. (Dkt. 154). On December 22, 2009, Yellowstone filed its Opposition to Gaston's Motion for Amendment of Judgment. (Dkt. 156). Gaston filed a reply brief. (Dkt. 158). On February 5, 2010, the District Court denied the Rule 59(g) Motion.

III. STATEMENT OF FACTS

Gaston's statement of the facts is based on a cross-pollination of factual sources submitted to the District Court *before* the Court's summary

judgment Order and factual sources that were not presented until *after* the Court's Order. This presentation misleadingly suggests that Gaston submitted these factual sources before the District Court issued its Order. Although Gaston had disclosed Ron Farmer as an expert in August 2008 and had 14 months to obtain an affidavit from Kelly Taylor, Gaston did not submit their affidavits until after the Court's Order. Yellowstone has divided its Statement of Facts into the undisputed facts presented to the Court before the summary judgment hearing, the factual sources presented when Gaston filed its Second Motion, and the factual sources Gaston presented with its Rule 59(g) Motion.

A. UNDISPUTED FACTS BEFORE THE HEARING

On September 20, 2006, Yellowstone advanced $4,545,473.00 to Oakwood and Oakwood executed and delivered to Yellowstone a promissory note for that amount ("First Loan"). (Gaston's Brief in Support of Motion for Summary Judgment (Dkt. 25), Exs. C & B). The express purpose of the First Loan was to fund the $4,500,000 purchase of the real property at issue in this lawsuit (the "Property"). (Paul Aff. ¶4 (Dkt. 34); Settlement Statement to Dkt. 34; Dkt. 25, Ex. C). The balance of the loan was used to cover closing costs and fees. (Dkt. 25, Ex. C). Oakwood used the proceeds from the First Loan to purchase the Property on September 20,

2006, the same day Oakwood executed the promissory note. Gaston admits that, "Oakwood borrowed money from Yellowstone . . . to buy the Property 'for development purposes.'" (Dkt. 25, p. 1). Gaston further admits that the specific purpose of the First Loan was to "purchase land for development." (Id., p.4, ¶¶10-11). To reinforce this, Gaston attached to its brief the Promissory Note, Boarding Data Sheet and Mortgage. (Id., Exs. B & C).

On September 20, 2006, Yellowstone recorded its Mortgage on the Property to secure the First Loan. (Id., Ex. D). Gaston admits this. (Id., p. 4, ¶12). This Mortgage was recorded in conjunction with the First Loan to Oakwood. (Id., Ex. D). The Mortgage and the Warranty Deed to the Property were recorded at the exact same time (4:40 p.m.) on September 20, 2006. (Dkt. 42; Dkt. 25, Ex. D). Gaston admits this.

The Mortgage contains a Future Advances clause, which will be discussed in the Argument section. (Dkt. 25, Ex. D at YB000184). The Mortgage also contains a provision setting forth the maximum principal indebtedness ($6,000,000.00) that may be outstanding at any given time which is secured by the Mortgage.

The Future Advances clause is significant because Gaston suggests that this clause and the maximum principal indebtedness clause constitute a

loan commitment[1] and undermine the priority status of Yellowstone's First Loan. (*See* Opening Brief, p. 5; Dkt. 40, p. 7). As will be explained later, this position is incorrect. Under Montana law, real property may be mortgaged to secure debts created simultaneously with the execution of the mortgage and to secure advances to be made in the future. Mont. Code Ann. §§ 71-1-201, -206 (2007).

On November 22, 2006, Yellowstone loaned an additional $135,000.00 to Oakwood and Oakwood executed and delivered to Yellowstone a promissory note in that amount ("Second Loan"). (Dkt. 25, p. 4, ¶13 & Exs. F & E). The purpose of the Second Loan was to cover costs of entitlement processing for the Property. (Id., Ex. F). The entitlement processing costs related to obtaining plat approval. A permitted by Montana law, on November 27, 2006, Yellowstone recorded a modification of the first Mortgage, which modification added the Second Loan as additional secured debt. (Id., Ex. G). These facts have not been disputed.

Gaston recorded its construction lien on October 12, 2007. (Dkt. 25, Ex. A). Gaston asserts its work began on the Property on June 12, 2006, before Oakwood owned the Property, and ended on September 18, 2007.

---

[1] Yellowstone did not make a commitment to extend further financing to Oakwood at the time of the First Loan. (Paul Aff., ¶ 7; Harris Aff., ¶¶ 3-6).

(Complaint, ¶7; Dkt. 25, p. 3, ¶3). However, Gaston never once submitted any evidence establishing the date on which it made the first visible change in the physical condition of the Property. Gaston simply stated that it began work on June 12, 2006. (Complaint,¶7; Dkt. 25, p. 3, ¶3).

Before the summary judgment hearing, Gaston never disputed that the Mortgage recorded on September 20, 2006 was given for the price of the Property at the time of its conveyance. During oral argument, Gaston's counsel admitted that the First Loan was used to purchase property. Gaston stated, "[t]he purchase price of the property was $4.5," which was the amount of the first loan, excluding costs. (Tr. at 57:16-17). The Court and Gaston then had the following exchange:

> THE COURT: Except for this note says that the note principal is $4.5.
>
> MS. SIRONI: Well, that's the – that was for the ***purchase*** –
>
> THE COURT: There are two notes?
>
> MS. SIRONI: There are two notes, but the mortgage – this is the promissory note.
>
> THE COURT: Yes.
>
> MS. SIRONI: The mortgage secured $6 million.
>
> THE COURT: So, there's a second note for another $1.5 million?

> MS. SIRONI: No, there is not. There is the first note of $4.5. There's a second note of $135, which I'm going to show you in a second.

(Tr. at 57:22-58:15) (emphasis added)[2]. The only issue argued to the Court was whether Gaston's lien attached on June 12, 2006.

B. GASTON'S SECOND MOTION

On August 10, 2009, Gaston filed its Second Motion. (Dkt. 97). Gaston filed this document under the guise that it had uncovered "hard" evidence that, after the First Loan, Yellowstone agreed to provide additional financing for entitlement processing costs. (Id. at 2-3). However, the "hard" evidence actually included documents that Gaston had months before it filed its motion[3] and a loan comment William Paul drafted when Yellowstone funded the First Loan. In that comment, Mr. Paul wrote:

> Have set up the note for Kelly and Tim to purchase the development property northwest of Bozeman. Purchase price of the land $4,500,000.

(Id., Ex. C, YOBANK 01564). At the end of this lengthy comment, Mr. Paul further stated:

> Kelly and Tim anticipate that the entitlements process will take them 4 to 6 months. They ***may*** ask us for a modest amount of additional financing for some of the entitlements processing costs, namely engineering, surveying, etc. in an amount of approx. $100,000. Did

---

[2] This exchange concerned whether a dispute of fact existed about Yellowstone's knowledge of Gaston's work before Yellowstone made the First Loan. Gaston was not disputing that the First Loan was used to purchase the Property. (Tr. at 57:7-59:13).

[3] Dkt. 98, pp. 4-5.

> tell them at closing that I did not think that this would be any problem for us to handle for them.

(Id.) (emphasis added). Gaston's Second Motion then restated what Gaston and the Court had known for almost one year, i.e. on November 22, 2006, Yellowstone made the Second Loan to Oakwood in the amount of $135,000 for entitlement processing costs. Mr. Paul's loan comment from November 2006 regarding the Second Loan stated, in part:

> **SET UP $135,000.00 STRAIGHT LOC** [line of credit] . . . Have set this note up for Kelly and Tim to provide financing for the entitlements processing for the subdivision project at the Penwell Bridge and Spain Bridge Road property. Their total estimated costs for the entitlements is approximately $135,000.00, which is how we determined the amount of this line. They will be sending me copies of invoices that they have paid and I will be reimbursing them from this line.

(Id., Ex. C, YOBANK 01563). Gaston submitted documents to the Court showing that, on November 22, 2006 and in 2007, Yellowstone reimbursed Oakwood for entitlement costs, including Gaston engineering fees. Gaston had known these facts for at least one year.

As stated above, Gaston repeatedly admitted that Yellowstone's First Loan and the related Mortgage were exclusively for the purchase of the Property. Gaston simply argued that its lien attached first. Notwithstanding these admissions, Gaston argued for the first time that Yellowstone was required to record two mortgages (one for each loan) and Yellowstone did

not have a purchase money mortgage. (Dkt. 97, pp. 2, 4, & 5). However, Gaston still had not set forth new material facts and the following remained undisputed: (1) Oakwood did not have an ownership interest in the Property on June 12, 2006; (2) on September 20, 2006, Yellowstone loaned Oakwood money to purchase the Property; and (3) under Montana law, Yellowstone had the right to record one mortgage to secure several loan instruments, including future advances.

As a result, Yellowstone filed a cross-motion for summary judgment and argued its Mortgage had priority. (Dkt. 98). Yellowstone requested oral because Gaston had raised new arguments **and** Yellowstone was seeking summary judgment. (Dkt. 99). Gaston objected to this request because the "matter of summary judgment ha[d] been well briefed by both parties" and Gaston did not want to delay the ruling. (Dkt. 102).

C. GASTON'S RULE 59(g) MOTION

On December 11, 2009, Gaston filed its second Rule 59(g) Motion. (Dkt. 155). With that Motion, Gaston submitted the affidavits of Kelly Taylor (a member of Oakwood)[4] and Ron Farmer, the expert that Gaston

[4] Gaston's Opening Brief contains statements to the effect that, before it made the First Loan, Yellowstone promised Oakwood it would "partner" with Oakwood on the development. These statements are false and irrelevant. (Dkt. 156, pp. 14-15; Dkt. 116, pp. 5-6; Dkt. 78 & 79).

had disclosed in August 2008. Gaston's counsel also filed an affidavit regarding matters about which she had no personal knowledge and documents she could not authenticate. (Dkt. 156, pp. 15-18). In opposing this Motion, Yellowstone pointed out that, while Gaston had changed its legal arguments and had ample opportunity to submit the Taylor and Farmer affidavits, Gaston failed to do so. (Id. at pp. 11-15).

Although Gaston had inundated the Court with multiple briefs over the course of 14 months, the following material facts remained absolutely unchanged despite Gaston's Rule 59(g) Motion: (1) Yellowstone made two separate loans evidenced by two promissory notes; (2) the "First Loan" was made on September 20, 2006; (3) the "First Loan" was used to purchase the Property; (3) the Mortgage was given and recorded on September 20, 2006 at the time of the Property was conveyed; (5) the Mortgage was given to secure the First Loan; (4) the Mortgage included a future advance clause as permitted by Montana law; (5) the "Second Loan" was made two months after the "First Loan" under a separate promissory note; (6) the purpose of the "Second Loan" was to cover entitlement processing costs; and (7) Yellowstone properly modified the Mortgage to show that it secured the Second Loan. The Taylor, Farmer and Sironi affidavits did nothing to disprove these simple, yet critical, undisputed facts. (Dkt. 156, pp. 8-18).

IV. STANDARD OF REVIEW

This Court reviews the district court's ruling on summary judgment de novo, applying the same criteria under M. R. Civ. P. 56. *Paull v. Park County*, 2009 MT 321, ¶17, 352 Mont. 465, 218 P.3d 1198. This Court reviews the trial court's denial of a motion to alter or amend judgment under M. R. Civ. P. 59(g) to determine whether the court abused its discretion. *Lee v. USAA Cas. Ins. Co.,* 2001 MT 59, ¶27, 304 Mont. 356, 22 P.3d 631. The test for an abuse of discretion is "whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." *In re Custody and Parental Rights of C.J.K.,* 2005 MT 67, ¶13, 326 Mont. 289, 109 P.3d 232 (quoting *In re K.C.H.,* 2003 MT 125, ¶11, 316 Mont. 13, 68 P.3d 788).

V. SUMMARY OF ARGUMENT

Oakwood did not own the Property before September 20, 2006. Gaston's lien could not have attached on June 12, 2006 because Oakwood did not own the Property. Thus, Yellowstone's Mortgage has priority. Additionally, Yellowstone has a purchase money mortgage which has priority over Gaston's lien.

Under Montana law, one mortgage document can secure two separate promissory notes. Where, as here, one recorded mortgage document secures

both a loan used to purchase property and a subsequent loan used for entitlement processing, the loan used to purchase the property retains its purchase money mortgage status even though the subsequent loan may have been used to pay for the real estate improvement liened. Thus, Yellowstone was not required to record two mortgages in order to preserve the purchase money status of the Mortgage securing the First Loan.

Yellowstone filed a valid cross-motion for summary judgment and Gaston had ample notice of Yellowstone's request for summary judgment. Gaston's Rule 59(g) Motion merely was an attempt to relitigate matters that the District Court had decided. Thus, the District Court did not abuse its discretion in denying Gaston's Rule 59(g) Motion.

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT GASTON'S LIEN DID NOT ATTACH BEFORE OAKWOOD OWNED THE PROPERTY

Gaston argued in its first motion for summary judgment that its lien attached on June 12, 2006, before Yellowstone recorded its Mortgage. Gaston specifically represented to the District Court that "attachment" was the dispositive issue.

In its Opening Brief, Gaston begins by arguing that Yellowstone's Mortgage secured an advance under Mont. Code Ann. § 71-3-542(4) and,

therefore, Gaston has priority. However, § 71-3-542(4) only applies where a mortgage is filed *before* a construction lien *attaches*. Mont. Code Ann. § 71-3-542(4). As a result, § 71-3-542(4) should not be the starting point for analyzing priority unless the construction lien claimant acknowledges that its construction lien attached on a specific date *after* the mortgage was filed. Here, Gaston consistently has maintained that its lien attached on June 12, 2006. (Complaint, ¶7, Ex. A to Complaint, p. 2; Dkt. 25, p. 8; Dkt. 40, pp. 3-4; Dkt. 49, p. 7; Dkt. 66, p. 4; Opening Brief, pp. 4, 17-21). By putting its eggs in one basket, Gaston painted itself into a corner because it never presented any evidence to the District Court specifying the day on which its lien attached *after* Yellowstone recorded its Mortgage. Gaston's Opening Brief suffers the same infirmity. The only evidence and argument presented to the District Court and this Court is that Gaston's lien attached on June 12, 2006. Consequently, the District Court's Order Re: Summary Judgment began by analyzing the "attachment" date of Gaston's lien. Since the attachment date of Gaston's lien is a dispositive issue in this case, Yellowstone respectfully submits that the first issue this Court should address is whether Gaston's lien attached on June 12, 2006. If it did not attach on June 12, 2006, there is no need to address Gaston's remaining arguments because Gaston has not submitted an alternative date on which its

lien attached. Rather, Gaston simply has represented that it performed work under a real estate improvement contract that ended in 2007.

1. Gaston's Lien Did Not Attach Before September 20, 2006.

A lien is created by contract or operation of law. Mont. Code Ann. § 71-3-102 (2007). [5] Gaston's lien is governed by Montana's construction lien statutes. Mont. Code. Ann. § 71-3-521. The construction lien statute "creates and provides for the attachment and enforceability of a construction lien against real estate in favor of a person furnishing services or materials under a *real estate improvement contract.*" Id. (emphasis added). A "real estate improvement contract" is an agreement to perform services, labor or materials for the purpose of producing a change in the physical condition of the real estate. Mont. Code Ann. § 71-3-522(6). A "real estate improvement contract" cannot exist without a "contracting owner."

---

[5] Gaston's brief cites to the 2009 lien statutes, portions of which were amended but did not become effective until October 1, 2009. *See* Mont. Code Ann. §§ 71-3-524, -525, -526, -531, -532, -533, -537, -538, -541, & -542 (2009). Because Gaston filed its Construction Lien on October 12, 2007, the 2007 version of the lien statutes applies. *See JTL Group, Inc. v. New Outlook, LLP*, 2010 MT 1, ¶6 n.2, 355 Mont. 1, 223 P.3d 912. The amendments to the 2007 statutes became effective on October 1, 2007. *See* 71-3-522 & -531 (2007). The District Court appears to have relied on the 2007 version of the statute, with one exception. (Dkt. 131, p. 7 (citation to Mont. Code Ann. § 71-3-525 (2007)). The exception appears on page 5 in the Order where the District Court cites to Mont. Code Ann. § 71-3-542 (2009). Yellowstone has cited the 2007 statutes since they were in effect and were argued by Gaston and Yellowstone to the District Court.

A "contracting owner" is "a person who *owns* an interest in real estate." Mont. Code Ann. § 71-3-522(4)(a).

A lien can only attach and be enforced after entering into the contract under which the lien arises. Mont. Code Ann. § 71-3-535(1). A lien attaches at the "commencement of work," as that term is defined in § 71-3-522. Mont. Code Ann. § 71-3-535(5). "Commencement of work" is the "date of the first visible change in the physical condition[6] of the real estate caused by the first person furnishing services or materials pursuant to a particular *real estate improvement contract.*" Mont. Code Ann. § 71-3-522(1) (emphasis added).

Gaston could not have "commenced" work until Oakwood owned the Property because Oakwood was not a "contracting owner" until it owned the Property. *See* Mont. Code Ann. §§ 71-3-522(1), (4), & (6). A lien can only extend to the interest of the contracting owner in the real property. *See* Mont. Code Ann. §§ 71-3-522(4), -525(1). Thus, it logically follows that Gaston's lien could not extend to Oakwood's interest in the Property in June 2006 since Oakwood did not own the Property until September 20, 2006.

---

[6] There is no specific evidence that Gaston made a visible change in the physical condition of the real estate on June 12, 2006. (Tr. at 16:16-17:10). Gaston claims on June 12 it dug test pits. (Opening Brief, pp. 4-5 & 17). Gaston's support for this is the Stipulated Judgment, which simply states that Gaston commenced work on June 12. (Dkt. 45). Gaston's own invoices for June 2006 do not show the day on which any wells were dug. (Dkt. 35, Invoices).

The day Gaston claims that its lien attached is actually the day Oakwood signed a Buy-Sell Agreement to purchase the Property. (Dkt. 98, Ex. A). The Buy-Sell contained at least three contingencies, including a financing contingency. (Id. at YSB000452-454). The Buy-Sell reveals that Oakwood did not own any interest in the Property on June 12, 2006 and was merely a buyer conducting due diligence.

Based on these undisputed facts, the District Court properly concluded that Gaston's lien did not attach at any time before Oakwood owned the Property. Thus, Yellowstone's Mortgage has priority.

2. Yellowstone Never Admitted That Oakwood Was A Contracting Owner.

Yellowstone never conceded Oakwood was a "contracting owner" for purposes of allowing Gaston's lien to attach before Yellowstone filed its Mortgage. Oakwood eventually owned the Property because Yellowstone loaned the money to Oakwood for the purchase. At some point *after* Oakwood purchased the Property, Oakwood may have been a contracting owner with Gaston. However, as stated above, Oakwood could not have been a contracting owner before it owned the property. Thus, Yellowstone could not have admitted that Oakwood was a contracting owner before Oakwood owned the property.

Further, Yellowstone denied the allegation in Gaston's Complaint that Gaston's work began on June 12, 2006. Yellowstone denied paragraph 7 of the Complaint which alleges:

> [B]eginning on June 12, 2006 and ending on September 18, 2007, Gaston Engineering supplied various engineering, surveying, and soils testing services, as more fully set forth in the construction lien discussed below, for the plaintiff's real estate improvement project involving the development of the Trout Creek Subdivision on the Subject Property.

Yellowstone plainly denied that Gaston's work began on June 12 pursuant to a real estate improvement contract with Oakwood. This denial negates the claim that Oakwood was a "contracting owner" for purposes of determining priority.

Yellowstone denied that "Gaston Engineering's Construction Lien is in all respects a valid, effective lien, encumbering the real property described herein as the Subject Property." (Complaint, ¶15; Amended Answer). Yellowstone also denied that Gaston had priority over Yellowstone's Mortgage. (Complaint, ¶19; Amended Answer). Finally, the Pretrial Order, which supersedes the pleadings, clearly states that Oakwood was not a contracting owner for purposes of attachment. (Dkt. 76, pp. 9-10, ¶¶6-7, 17-19). Again, Gaston disregards these facts and this Court should disregard Gaston's argument.

3. The *Swain* Decision And Section 71-3-525 Do Not Support Gaston's Argument.

Citing *Swain v. Battershell*, 1999 MT 101, 294 Mont. 282, 983 P.2d 873, Gaston cursorily states that a "contracting owner" is defined as of the date the construction lien is filed, not at the "commencement of work." This would purportedly support Gaston's attachment argument. Gaston also suggests that Mont. Code Ann. § 71-3-525(1) supports it attachment argument. Neither of these sources supports Gaston.

In *Swain*, this Court invalidated a construction lien because, at the time of filing the lien, the defendant did not own the property. *Swain*, ¶¶ 26-27. In reaching this conclusion, this Court reiterated that the construction lien only extends to the interest of the contracting owner in the real estate as that interest exists at the commencement of work or is thereafter acquired. *Id*, ¶ 25. *Swain* confirms that a lien cannot encumber property unless and until the lien claimant has a real estate improvement contract with a person that owns the property. The corollary to this is that a lien cannot attach at any time before the lien holder's client owns the property. Thus, Gaston's lien could not have attached in June 2006.

Similarly, Gaston's reference to Mont. Code Ann. § 71-3-525(1) does not support its argument. As a preliminary matter, Gaston cites to the 2009 version of this statute in its Opening Brief. However, Gaston and the

District Court relied on the 2007 statute. (Dkt. 60, p. 6; Dkt. 66, p. 9; Dkt. 61, pp. 5-6).

A construction lien can only extend to "the interest of the contracting owner in the real estate, as the interest exists at the commencement of work or is thereafter acquired in the real estate." Mont. Code Ann. § 71-3-525(1). The language of this statute is clear. Work cannot commence unless there is a "real estate improvement contract." Mont. Code Ann. § 71-3-522(1). There cannot be a "real estate improvement contract" unless there is a "contracting owner."

The word "thereafter" in the statute does not mean that, in the context of the statute, a construction lien can attach before a person owns real property. The word "thereafter" means "[a]fter the time last mentioned; after that; after that time." Blacks Law Dictionary 1478 (6th ed. 1990). In this statute, the "time last mentioned" is the interest as it existed at the commencement of work. Thus, if a person had a percentage ownership at the commencement of work and such percentage ownership increased after the commencement of work, the construction lien could extend to the owner's increased interest. However, the statute is clear that the contracting owner must own an interest in the property at the commencement of work. The District Court recognized that § 71-3-525 did not apply because

Oakwood did not own any interest in the Property on June 12, 2006, the date Gaston claims its work commenced.

4. Gaston Had No Agreement To Create A Lien On A Future Interest.

There is only one way that Gaston could have obtained a lien interest in the Property before Oakwood owned the property. Montana law addresses the situation where, as here, a party seeks a lien on property not yet acquired:

> **71-3-105. Lien on future interest.** An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien or not yet in existence. Except as otherwise provided by the Uniform Commercial Code, in such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.

Gaston argues that this statute relates only to the creation of a lien and not attachment. This is simply incorrect. Not only does this statute provide for the creation of a lien on property not yet acquired, it also addresses when the lien attaches. The lien does not attach until the party agreeing to give the lien acquires an interest in the property. This statute reinforces the argument that Gaston's lien could not attach before the "contracting owner" owned an interest in the property unless Gaston complied with this statute. Here, Gaston had no such agreement.

5. Yellowstone's Purchase Money Mortgage Has Priority.

Even if Gaston's lien attached on June 12, 2006, Yellowstone's Mortgage still has priority because it was a purchase money mortgage. Under Montana law, "a mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws." Mont. Code Ann. § 71-3-114. As the District Court recognized, it is undisputed that Yellowstone's First Loan was given to Oakwood to purchase the Property. The Mortgage secured the First Loan and was recorded the same date Oakwood closed on the Property. Thus, Yellowstone's Mortgage is a purchase money mortgage and has priority over all other liens created against Oakwood's Property. Mont. Code Ann. § 71-3-114.

This Court recognized the priority of purchase money mortgages well before the legislature passed the current statutes. *See Soliri v Fasso*, 56 Mont. 400, 185 P. 322, 324 (Mont. 1919). In *Soliri*, this Court addressed whether a purchase money mortgage had priority over a mechanics lien, even if the mortgage was entered into after the commencement of work. The trial court found that, because the mortgage was entered after the commencement of work, the mechanics liens were superior to the mortgage. *Id.* This Court held that the purchase money mortgage created "an interest

in favor of [the defendant], superior to the lien claims both as to the lot and the building," even though the mechanic's lien holder had started work. *Id.*; *see also* Restatement (Third) of Property: *Mortgages* § 7.2 (1997) ("A purchase money mortgage . . . has priority over any mortgage, lien, or other claim that attaches to the real estate"). The policy behind this rule is sound. "The property probably would never be sold to a vendee and the purchase money advanced for that purpose if the purchase money mortgagee anticipated that its interest would be inferior to that of another creditor." *Guffey v. Tennessee*, 984 S.W.2d 219, 222 (Tenn. Ct. App. 1998).

Montana's construction lien statutes have not altered the priority of purchase money mortgages. Section 71-3-542(1) addresses the priority of construction liens as against interests other than construction liens:

> (1) A construction lien arising under this part has priority over any other interest, lien, mortgage, or encumbrance that may attach to the building, structure, or improvement or on real property on which the building, structure, or improvement is located and that is filed after the construction lien attaches.

Mont. Code Ann. § 71-3-542(1). Gaston incorrectly claims this section gives construction liens priority over "any mortgage," including purchase money mortgages. (Opening Brief, p. 26).

When interpreting statutes, the court will not construe a statute to insert what has been omitted or to omit what has been inserted but, "[w]here

there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Mont. Code Ann. § 1-2-101. The "court must harmonize statutes relating to the same subject, as much as possible, giving effect to each." *Oster v. Valley County,* 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079.

In this case, § 71-3-114 specifically addresses priority of purchase money mortgages. In contrast, § 71-3-542(1) does not specifically address purchase money mortgages. Instead, it generally discusses priority of construction liens in relation to other claims. "Where a specific statute conflicts with a general statute, the specific controls over the general to the extent of any inconsistency." *Stockman Bank of Montana v. Mon-Kota, Inc.*, 2008 MT 74, ¶31, 342 Mont. 115, 180 P.3d 115. Therefore, § 71-3-114, which specifically addresses priority of purchase money mortgages, controls over the general statute relating to construction liens and other claims. Moreover, it is presumed that "the legislature acted with deliberation and with full knowledge of all existing laws on the subject." *State v. Brown*, 2009 MT 452, ¶10, 354 Mont. 329, 223 P.3d 874. Thus, the legislature knew that § 71-3-114 gave purchase money mortgages priority over *all* other liens when it enacted § 71-3-542(1). If the legislature had intended for a construction lien to have priority over a purchase money mortgage, it should

have expressly stated this in the construction lien statutes. By not doing so, the legislature deliberately recognized the priority of purchase money mortgages over construction liens.

Finally, the word "any" used in the statute simply modifies the phrase "other interest" to refer to "any other interest" that may be reflected in documents such as a lis pendens. However, "any" does not immediately precede the word "mortgage" or modify it.

B. YELLOWSTONE WAS NOT REQUIRED TO RECORD TWO MORTGAGES

The crux of Gaston's argument is that Yellowstone was required to record separate mortgages to preserve the priority of the First Loan over Gaston's lien. Gaston contends that the alleged failure to record two mortgages converted the First Loan into an advance "made for the purpose of paying for the particular real estate improvement being liened." Mont. Code Ann. § 71-3-542(4). This argument exhibits a fundamental misunderstanding of the law governing mortgages and the actual language of the Mortgage. Montana law expressly recognizes Yellowstone's legal right to file a mortgage that secures two separate instruments, including an instrument that was executed after the mortgage was recorded. The latter is called a future advance. The fact that a mortgage secures a legal instrument executed simultaneously with a mortgage **and** an instrument executed after

the mortgage does not change the purchase money status of either the First Loan or the Mortgage securing the First Loan.

1. One Mortgage Can Secure Two Separate Notes.

It is undisputed that Yellowstone loaned Oakwood $4.5 million to purchase the Property and Oakwood granted Yellowstone a Mortgage as security for the loan. (Dkt. 25, p. 4 at ¶¶10-11, Exs. B & D; Dkt. 34, ¶¶3-5; Dkt. 43, ¶5). The Mortgage contains a Future Advances clause that states:

> **FUTURE ADVANCES.** In addition to the Note, this Mortgage secures all future advances made by Lender to Grantor whether or not the advances are made pursuant to a commitment. Specifically, without limitation, this Mortgage secures, in addition to the amounts specified in the Note, all future amounts Lender in its discretion may loan to Grantor, together with all interest thereon.

(Dkt. 25, Ex. D,YB000184). The word "Note" is a defined term in the Mortgage:

> **Note.** The word "Note" means the promissory note dated September 20, 2006 in the original principal amount of $4,545,473.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancing of, consolidations of, and substitutions for the promissory note or agreement. The maturity date of the Note is September 20, 2007.

(Id., YB000193). The Mortgage also sets forth the maximum principal indebtedness that may be outstanding at any given time which is secured by the Mortgage:

> **MAXIMUM LIEN.** The total principal indebtedness that may be outstanding at any given time which is secured by this Mortgage is $6,000,000.00.

(Id., YB000183). Each of these provisions is permitted by Montana law.

Any interest in real property which is capable of being transferred may be mortgaged. Mont. Code Ann. § 71-1-201. Section 71-1-201 goes on to state:

> Such property or interest may be mortgaged to secure existing debts, *to secure debts created simultaneously with the execution of the mortgage, and to secure advances then in contemplation but to be made in the future.*

(Id.) (emphasis added). Under Montana law, Oakwood had the right to mortgage the Property to secure a debt created when Oakwood executed the Mortgage. This is precisely what Oakwood did on September 20, 2006.

Oakwood also was entitled to mortgage the Property to secure all future advances made by Yellowstone to Oakwood. This undisputed fact is set forth on the face of the Mortgage. The Mortgage expressly states that, "[i]n addition to the Note, this Mortgage secures all future advances." (Id.). Yellowstone did exactly what the law allowed it to do – it obtained a mortgage that secured both a debt created simultaneously with the execution of the mortgage and future advances. Mont. Code Ann. § 71-1-201.

The Mortgage also complied with Montana law governing future advances:

> **71-1-206. Future advances.** (1) The amount of future advances or total indebtedness that may be outstanding at any given time and subject to mortgage protection **must be stated in the mortgage**. The mortgagee may reserve the right, at the mortgagee's option, to refuse to make all or any part of a future advance. The total amount of the indebtedness that may be secured by the mortgage may decrease or increase from time to time, but the total principal amount of the obligations secured at any one time may not exceed the face amount stated in the mortgage together with interest **as provided in the instrument secured by the mortgage**. (Emphasis added).

Under § 71-1-206, Yellowstone was permitted to include a future advances clause in the Mortgage so long as the Mortgage set forth the total indebtedness that may be outstanding at any given time. The Mortgage did this by stating the "total principal indebtedness that may be outstanding at any given time which is secured by this Mortgage is $6,000,000.00."

Further, the future advances statute expressly recognizes that there will be an "instrument secured by the mortgage." Mont. Code Ann. § 71-1-206(1). As a result, when § 71-1-206 is read in conjunction with § 71-1-201, it is clear that **one** mortgage may be recorded to secure an instrument created simultaneously with the mortgage and to secure an instrument executed at some time in the future. In effect, one recorded mortgage can serve as "two mortgages" under Montana law. Gaston's argument promotes form over function whereas the law does not require such form.

Gaston's "one mortgage" argument shows that Gaston blurs the distinction between a promissory note and a mortgage. A promissory note is a lending instrument. A mortgage is a security instrument that secures lending instruments. Gaston seemingly argues that, because the Mortgage references a "total principal indebtedness" of $6,000,000 and secures two loans, the Mortgage constitutes single promissory note. Gaston would like this Court to believe that, since the Mortgage permitted futures advances, a future advance made under a separate promissory note would nullify the purchase money and priority status of the First Loan if the "future advance" funds were used for entitlement processing. But, this argument is inconsistent with § 71-3-542(4).

Section 71-3-542(4) makes it clear that, in order to determine whether a mortgage was given to secure "advances" made to pay for the improvement being liened, one actually must scrutinize the advance (i.e., loan) itself. Where there are two lending instruments with two separate purposes, each lending instrument must be separately scrutinized to determine the purpose underlying the funds advanced under those instruments in order to determine priority. Nowhere in § 71-3-542(4) is there any suggestion that a purchase money loan secured by a mortgage will be transformed into a "construction loan" simply because the mortgage

secures a separate note under which advances were made to pay for the real estate improvement being liened. Read together, §§ 71-1-206 and 71-3-542(4) recognize that one mortgage document may secure multiple and separate loans. If the purpose of each loan secured by the mortgage is different, then the characterization of the mortgage securing the individual loan is different for each loan. According to Gaston's argument, if Oakwood had paid off the Second Loan before Gaston filed this foreclosure action, Gaston would still have priority because, at one time, the Mortgage had secured an advance made for entitlement processing. This result is inconsistent with the law.

Additionally, the future advances statute provides that future advances have priority to the same extent as if an advance had been made when the mortgage was executed. The statute states:

> (2) **The lien for the stated amount of future advances or total indebtedness shall,** notwithstanding the fact that from time to time during the term of the mortgage no indebtedness is due from the mortgagor to the mortgagee, **have priority to the same extent as if the amount thereof had been actually advanced by the mortgagee to the mortgagor at the time of the execution of the mortgage.** The lien extends to interest as provided in the instrument secured by the mortgage. (Emphasis added.)

Mont. Code Ann. § 71-1-206(2). This statute shows that the legislature specifically addressed the priority of future advances. However, this statute does not suggest that a future advance alters the priority of the First Loan.

Rather, for purposes of determining priority, a future advance made under a separate loan is analyzed independently from any other loans the Mortgage secures.

Basically, Gaston wants to "cherry pick" the Second Loan and use the purpose of the Second Loan to drive the First Loan. This self-serving approach is arbitrary and capricious. Based on this arbitrary approach, Yellowstone should be able to "cherry pick" the First Loan and allow it to drive the purpose of the Second Loan. However, the law requires the independent analysis of both loans for purposes of determining priority over Gaston's lien. Gaston's "one" mortgage argument is a fabricated legal fiction. The District Court recognized this and ruled correctly.

2. *Signal Perfection* Does Not Apply.

Gaston relies on *Signal Perfection LTD v. Rocky Mountain Bank – Billings*, 2009 MT 365, 353 Mont. 237, 224 P.3d 604. *Signal* is not on point, is distinguishable and, to the extent it applies, it supports Yellowstone's arguments.

In *Signal*, Blackhawk took out a $5 million construction loan (hereinafter "construction loan") from Rocky Mountain Bank ("RMB") to construct a casino. *Signal*, ¶4. Blackhawk hired SPL to install audio and video systems. *Id.* On November 15, 2005, Blackhawk withdrew the last

funds from the construction loan, but did not pay SPL. SPL filed a construction lien. *Id.*

SPL argued its lien had priority because the trust indenture secured financing for the construction of Blackhawk's casino. *Id.*, ¶5; Mont. Code Ann. § 71-3-542(4). RMB countered that SPL's work was severable and SPL continued work after RMB made its final advance. *Id.*, ¶5. The district court rejected RMB's arguments. *Id.*,¶6. In June 2008, RMB filed a Rule 59(g) motion. *Id.* ¶6. RMB argued that a portion of the construction loan was used to repay existing debt that Blackhawk owed to RMB. *Id.* ¶6.

On appeal, RMB represented that Blackhawk used $2.23 million of the $5 million construction loan to pay a pre-existing debt Blackhawk owed to RMB. (RMB's Appellate Brief, p. 2). The pre-existing debt actually was two loans evidenced by two notes which, in the aggregate, totaled $2.23 million. (Id., p. 3). According to RMB, the proceeds from these two loans were used to purchase the casino property and pay for construction costs. (Id., p. 2-3). However, the actual loan at issue in *Signal* involved **one** note and **one** loan which was characterized as a construction loan.

On appeal, RMB argued that, since a portion of the construction loan had been used to repay Blackhawk's existing debt, RMB had priority over the construction liens. *Signal*, ¶12. RMB also argued that it should have

priority over any amounts owed for work provided after Blackhawk withdrew the remaining funds of its construction loan.

The only issue this Court addressed in *Signal* was whether RMB's trust indenture securing its construction loan had priority over "those amounts of the contractor's construction liens that were attributable to labor and materials provided ***after*** RMB had fully disbursed Blackhawk's loan proceeds." *Id.* ¶¶17, 19 (emphasis added). This Court ruled that the language of § 71-3-542(4) does not support this argument, particularly since RMB's made a single construction loan for the express purpose of constructing the casino. *Signal,* ¶¶ 18, 20.

The instant case is distinguishable. First, in *Signal*, there was no dispute about when or how the construction lien attached. *Signal*, ¶18. Here, Yellowstone contends that its Mortgage has priority over Gaston's construction lien because Gaston's lien did not attach in June 2006.

Second, this case involves a purchase money mortgage. *Signal* had nothing to do with purchase money mortgages. Yellowstone's First Loan was secured by a purchase money mortgage and has priority over Gaston's lien.

Finally, unlike RMB, Yellowstone never made one construction loan that was used to pay off a previous loan which, in turn, had been used to

purchase property. It is undisputed that Yellowstone made two independent loans, one of which constituted a purchase money mortgage. Yellowstone's two loans were made for separate and distinct purposes. As stated above, Montana law specifically permitted Yellowstone to use one mortgage document to secure both a debt made simultaneously with the execution of the mortgage and a debt incurred under a separate instrument executed at a later date. Mont. Code Ann. §§ 71-1-201, -206(1). Thus, *Signal* is distinguishable and does not apply to this case.

C. GASTON IMPROPERLY RELIES ON CASES THAT PRE-DATE THE 1987 AMENDMENTS TO THE LIEN STATUTES.

Relying on cases that pre-date the 1987 amendments to the construction lien statutes, Gaston argues that the party with the least ability to protect its interest takes priority over previously recorded liens. *See Home Interiors, Inc. v. Hendrickson,* 214 Mont. 194, 692 P.2d 1229 (1984); *American Fed. Sav.& Loan Ass'n v. Schenk,* 241 Mont. 177, 785 P.2d 1024 (1990); *Beck v. Hanson*, 180 Mont. 82, 589 P.2d 141 (1979); *Tri County Plumbing & Heating, Inc. v. Levee Restorations, Inc.*, 221 Mont. 403, 720 P.2d 247 (1986) . These cases were not decided under the current priority statute. *See, e.g., American Fed.* at 181, 785 P.2d at 1027. These cases were

based on the law as it existed before the 1987 overhaul of the construction lien statutes and the enactment of Mont. Code Ann. § 71-3-542.

The statute cited in *Home Interiors*, Mont. Code Ann. § 71-3-502, was repealed in 1987 after the case was decided. *Home Interiors* is not the current law in Montana. Moreover, *Home Interiors* is distinguishable because a significant amount of the loan proceeds ($19,000) was loaned to the buyer for purposes of constructing improvements on the property. *Id.* at 195-96, 692 P.2d at 1230. In other words, a part of the loan was used to finance construction. *Id.* Here, Gaston does not dispute that the First Loan was used to purchase the Property. (Dkt. 25, p.4, ¶¶10-11).

Similarly, although *American Fed. Sav. & Loan Assn. v. Schenk* was decided in 1990, the the facts that gave rise to the lien dispute occurred in 1984 and 1985, before enactment of the 1987 lien statutes. Therefore, pre-1987 law applied. Nonetheless, *Schenk* favors Yellowstone. In *Signal*, this Court contrasted RMB's loan with the loan in *Schenk,* stating, "[t]he opposite is the case here, where RMB loaned the proceeds to Blackhawk for the express purpose of constructing the 12th Planet complex. At the time it made the loan, RMB had the opportunity to protect itself by either not making the loan or by conditioning it on Blackhawk's obtaining lien waivers from the contractors." *Signal*, ¶20. Here, unlike RMB, Yellowstone loaned

$4.5 million dollars to Oakwood to purchase the Property. Like the builder in *Schenk*, Gaston "could have protected itself by discovering the prior deed of trust . . . and then, presumably, refusing to" work. *See Signal*, ¶19. Like the lender in *Schenk*, it is undisputed that Yellowstone was not aware Gaston worked on the Property *before* Yellowstone made the First Loan. (Paul Aff., ¶9; Dkt. 34). Thus, Yellowstone could not have done anything differently to protect itself at the time of the First Loan.

More importantly, the cases Gaston cites ignore the controlling statutory policy that "a mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser." Mont. Code Ann. §71-3-114. Gaston could not have worked on Oakwood's project if Yellowstone, or another lender, did not provide purchase money financing. Thus, the law and policy support the District Court' Order.

D. THE DISTRICT COURT DID NOT SUA SPONTE GRANT SUMMARY JUDGMENT

At the summary judgment hearing, it was undisputed that the First Loan was for the exclusive purpose of purchasing the land. Gaston's counsel admitted this. (Tr. at 12:21-14:14:24; 57:16-17; 57:22-58:15). The Court, Gaston and Yellowstone agreed that there were two notes and two separate loans. Thus, Yellowstone requested that the District Court enter

summary judgment in its favor because no genuine issues of material fact existed and Yellowstone was entitled to judgment as a matter of law. (Tr. at 14:19-24; 25:24-26:4). During the hearing, the Court correctly noted that, if the material facts are undisputed, the Court could grant summary judgment for either Gaston or Yellowstone. (Id. at 26:13-27:2). In fact, "[a] cross-motion for summary judgment is not required for a court to enter summary judgment in the non-moving party's favor where it is apparent that no genuine issues of material fact exist." *See Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 11, 342 Mont. 147, 182 P.3d 41. Since there was no dispute of material fact, Yellowstone was not required to file a cross-motion for summary judgment. *See Lee*, at ¶11.

1. <u>Yellowstone Filed A Cross-Motion In August 2009.</u>

Gaston cannot credibly argue that Yellowstone did not file a motion for summary judgment. As stated above, Yellowstone was not required to file a cross-motion. However, Yellowstone did file a cross-motion.

On August 7, 2009, Gaston filed a Supplemental Brief in Support of Motion for Summary Judgment. Gaston raised arguments that never before had been raised. (Dkt. 97, p. 4). In effect, Gaston submitted a new Motion. Yellowstone addressed Gaston's arguments and, again, requested summary judgment in its favor. Yellowstone also requested a hearing.

Gaston filed a Supplemental Reply Brief. Despite Yellowstone's summary judgment request, nowhere in Gaston's Supplemental Brief or Supplemental Reply Brief did Gaston ever present a scintilla of admissible evidence undermining the well established fact that the First Loan was used to purchase the property. Gaston then opposed Yellowstone's request for oral argument. (Dkt. 102). As a result, Gaston waived the right to a hearing which, if held, would have set a deadline for Gaston to present affidavits or other admissible evidence in opposition to Yellowstone's cross-motion. *See, e.g., SVKV, L.L.C. v. Harding,* 2006 MT 297, ¶¶24-36, 334 Mont. 395, 148 P.3d 584 (failure to request hearing resulted in waiver of hearing).

While Gaston says that it disputed the purchase money status of the Mortgage, it presented no evidence to support these hollow statements. Gaston had 14 months to present an affidavit or some form of admissible evidence showing that Yellowstone's First Loan was ***not*** used to purchase the Property or was ***not*** secured by the Mortgage. Gaston utterly failed to do so, even though it filed multiple briefs[7] to support its summary judgment motions. Instead, it told the Court that, if this matter went to trial, it would present evidence intended to show that Yellowstone did not have a purchase money mortgage. However, these empty statements were not based on

[7] Dkt. Nos. 25, 40, 49, 60, 67, 71, 97, 100, 114, & 125.

actual evidence and, despite Yellowstone's request for summary judgment, Gaston never procured such evidence.

Instead of disputing Yellowstone's purchase money mortgage, Gaston actually presented the Court with evidence conclusively proving that Yellowstone's First Loan was used to purchase the Property. Gaston attached to its opening brief the following documents related to the First Loan: Promissory Note, Boarding Data Sheet, Disbursement Request and Mortgage. (Appellee's Appendix). These documents, along with Gaston and Yellowstone's statements of fact, established the undisputed facts. Gaston failed to raise a genuine issue of material fact and, as a result, the Court had no alternative but to rule that Yellowstone's First Loan had priority.

E. GASTON IGNORED THE STANDARD GOVERNING RULE 59(g) MOTIONS

Gaston's Rule 59(g) Motion failed to explain how or why the Court's summary judgment Order should be altered or amended. Instead, Gaston presented irrelevant and inadmissible evidence that it had ample opportunity to present before the Court issued its Order.

A Rule 59 motion "properly may raise newly discovered or previously unavailable evidence, but may not be used to relitigate old matters, present the case under new theories, raise arguments which could have been raised

prior to judgment or give a litigant a second bite at the apple." *Hi-tech Motors, Inv. v. Bombardier Motor Corp. of America*, 2005 MT 187, ¶34, 328 Mont. 66, 117 P.3d 159 (citing *Cook v. Hartman,* 2003 MT 251, ¶24, 317 Mont. 343, 77 P.3d 231). Here, Gaston tried to relitigate matters presented to the Court, present the case under a new theory, raise arguments that could have been raised before judgment and take a second bite at the apple. But, Gaston never established that the testimony or purported evidence set forth in the affidavits it submitted were unavailable before the Court's summary judgment Order. *Id.* As a result, the District Court properly denied Gaston's Motion. *Id.*

Ron Farmer's affidavit proves that Gaston simply was trying to relitigate matters and raise arguments that could have been submitted before the Order. Gaston disclosed Farmer as an expert more than one year before the summary judgment Order. Farmer's disclosure was silent about whether Yellowstone had a purchase money mortgage. (Dkt. 32). The words purchase money mortgage did not appear in his disclosure. Gaston never supplemented Farmer's disclosure and Farmer never prepared a report. It was only after the Court issued its Order that Gaston revealed Farmer's previously undisclosed legal opinions about priority.

Furthermore, Farmer's purported opinions were improper. Farmer's affidavit is chalk full of inadmissible speculative arguments and conclusions. Farmer is not the judge and he was in no position to tell the Court how to apply the law to undisputed facts. (Dkt. 156, pp. 11-14). Farmer does not specify the documents upon which he bases his legal opinion. He simply refers to the "Bank's loan file." (Farmer Aff., ¶3-4; Dkt. 156, pp. 11-14). Farmer has no personal knowledge of the loans. Nevertheless, he speculated about Yellowstone's intent. (Id., ¶¶6-7). An affidavit used to overcome summary judgment must be based on personal knowledge, which Farmer did not have. M. R. Civ. P. 56(e); *Hiebert v. Cascade Co.*, 2002 MT 233, ¶30, 311 Mont. 471, 56 P.3d 848; *Smith v. Burlington Northern and Santa Fe Ry. Co.*, 2008 MT 225, ¶41, 344 Mont. 278, 187 P.3d 630. Most importantly, Farmer does not present any evidence showing that the Mortgage did not secure a loan made exclusively for the purchase of the property.

Like Farmer's affidavit, Gaston did not show that it was unable to procure Kelly Taylor's affidavit before the Court issued its Order. Gaston simply used Taylor's affidavit to relitigate matters that had been decided. Like Farmer, Taylor never once suggested that Yellowstone's First Loan was not used to purchase the Property. Rather, Taylor's affidavit purposely skirts this issue.

Gaston's counsel filed her own affidavit in support of the Rule 59(g) Motion. She was not a fact witness and could not authenticate any of the documents attached to her affidavit. Gaston's suggestion that Yellowstone failed to somehow produce the documents attached to her affidavit is based on the incorrect and speculative assumption that Yellowstone had such documents.[8] The documents are Oakwood's documents, as Yellowstone explained at length in its Opposition to Plaintiff's Motion for Amendment of Judgment. (Dkt. 156, pp. 15-17). Thus, the District Court did not abuse its discretion in denying the Motion.

VII. CONCLUSION

The District Court properly concluded that the Mortgage securing Yellowstone's First Loan had priority over Gaston's construction lien. Thus, Yellowstone respectfully requests that this Court affirm the District Court's Order granting summary judgment in Yellowstone's favor.

[8] Yellowstone filed a Motion in Limine based on written comments made by counsel for Oakwood in the Other Action. Yellowstone did not divulge this letter to Gaston because it contained a confidential offer of compromise. Gaston is not a party to the Other Action. (Dkt. 156, pp. 15-16).

DATED this 2 day of August, 2010.

Respectfully submitted,
CROWLEY FLECK PLLP

By _____
David M. Wagner
P.O. Box 10969
Bozeman, MT 59719-0969

Attorneys for Appellee

CERTIFICATION PURSUANT TO M. R. App. P. 27(d)(iv)

Pursuant to M. R. App. P. 11(4)(d), I certify that Appellee's Answer Brief is double spaced, proportionately spaced, typed in Times New Roman, has a typeface of 14 points, and contains 9,787 words, calculated by Microsoft Office Word.

David M. Wagner

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of August, 2010, a true and correct copy of the foregoing document was mailed to the following counsel of record:

Kellie G. Sironi
P.O. Box 81646
Billings, MT 59108

Joby Sabol
Sabol Law Office
225 East Mendenhall
Bozeman, MT 59715

David M. Wagner